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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE DIMITRIUS HUGHES,

Defendant and Appellant.

A152556

(Contra Costa County  
Super. Ct. No. 051600774)

Andre Dimitrius Hughes appeals from a judgment entered upon a jury verdict finding him guilty of two counts of attempted second-degree robbery. He requests a remand so the trial court can decide whether to exercise its discretion under two statutory amendments to strike sentence enhancements that were imposed pursuant to Penal Code sections 667, subdivision (a) and 12022.53, subdivision (b).<sup>1</sup> We reverse in part.

We remand to the trial court only the sentence enhancements pursuant to section 667, subdivision (a), and correct the abstract of judgment with regard to enhancements. In all other respects, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

The jury found Hughes guilty of two counts of attempted second-degree robbery. (§§ 211, 664.) The jury also found true allegations that Hughes used a firearm under sections 12022.5, subdivision (a) and 12022.53, subdivision (b) for both counts.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

The court then found that Hughes suffered four prior serious or violent felony convictions under section 667, subdivisions (d) and (e) and 1170.12, subdivisions (b) and (c) as well as three prior felony convictions under section 667, subdivision (a)(1). In its discretion under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the court struck three of the four prior serious or violent felony convictions.

The court sentenced Hughes to six years on count one (§§ 211, 667, subd. (e)(1), 1170.12, subd. (c)) with 10 consecutive years for the section 12022.53, subdivision (b) firearm enhancement. The court imposed the “same sentence concurrent” on count two. Finally, the court sentenced Hughes to three consecutive terms of five years each on the three remaining prior serious felony enhancements under section 667, subdivision (a)(1), bringing the total fixed sentence to 31 years. Hughes timely appealed.

## **DISCUSSION**

At the time of sentencing, the serious felony and firearm enhancements were mandatory. (See former § 667, added by initiative, Primary Elec. (June 8, 1982); see former § 12022.53, added by Stats. 2010, ch. 711, § 5.)

After sentencing, but while this case was on appeal, Senate Bill No. 1393 became effective on January 1, 2019, amending sections 667 and 1385 to give trial courts discretion to strike serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1, 2.) Similarly, Senate Bill No. 620, which became effective on January 1, 2018, amended section 12022.53 to give trial courts discretion to strike enhancements “imposed by this section,” including firearm enhancements imposed under subdivision (b). (Stats. 2017, ch. 682, § 2; § 12022.53, subd. (h).)

### **I. Both statutory amendments apply.**

The parties agree that both statutory amendments apply to this appeal. We think so, too. Both amendments apply retroactively to non-final judgments. (See *People v.*

*Garcia* (2018) 28 Cal.App.5th 961, 971-973; see *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

## **II. Remand is appropriate for the prior serious felony enhancements.**

The parties also agree the case should be remanded to allow the trial court to consider whether to strike one or more of the prior serious felony enhancements. We agree as well. Remand is required unless “the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*); see *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

Here, the trial court did not give a “clear indication.” During sentencing, the trial court referred to the prior felonies only twice in the context of section 667, subdivision (a). The trial court called the enhancements “mandatory,” stated the court would not be “permitted to strike the strikes for that purpose anyway,” and they “must be imposed and cannot be stricken.” The trial court did not give any indication it would have refused to strike the enhancements if it had discretion. Thus, the case should be remanded for the trial court to decide whether to exercise its newfound discretion to strike one or more of the prior felony enhancements.

## **III. Remand is inappropriate for the firearm enhancement.**

The only contention between the parties in this appeal is whether the case should be remanded so the trial court could decide whether to strike the firearm enhancements pursuant to section 12022.53, subdivision (b). Hughes argues the trial court may be influenced by the change in law because the statutory amendment indicates that the penalty provision of section 12022.53 was too harsh. The People argue remand is unnecessary because the record demonstrates the trial court would not have stricken the firearm enhancements. We agree with the People.

Whether to remand the firearm enhancement presents the same consideration as the rule for remanding the prior serious felony enhancements. Resentencing is required

“unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ ” (*Gutierrez, supra*, 58 Cal.4th at 1391.)

Here, the trial court stated the 10-year enhancement “may not be stricken” and “[t]he [c]ourt wouldn’t strike it anyway.” While the trial court was bound by its lack of discretion at the time, it clearly stated it would not strike the enhancement even if it had the discretion to do so. Thus, remand for the firearm enhancement is not required.

Hughes’s reliance on *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*) is misplaced. In *Francis*, a defendant was convicted of violating former Health and Safety Code section 11530. At the time, section 11530 was a felony, but the trial court also could have granted probation. (*Id.* at pp. 69, 75.) While the case was on appeal, Health and Safety Code section 11530 was amended to provide for alternative sentences in county jail. (*Id.* at p. 75.) The *Francis* court remanded, stating, “[T]he mere fact that the Legislature changed the offense from a felony to a felony-misdemeanor conceivably might cause a trial court to impose a county jail term or grant probation.” (*Id.* at p. 77.)

However, subsequent Supreme Court cases have required more than a conceptual possibility of a more lenient sentence to remand due to a change in the law. For example, in *Gutierrez, supra*, 58 Cal.4th 1354, two juvenile defendants were sentenced as adults to life without the possibility of parole (LWOP). At the time, the statute required the trial court to apply a presumption in favor of LWOP. (*Id.* at p. 1360.) The Supreme Court, however, overturned that presumption. (*Id.* at p. 1387.) Remand for resentencing was required because “[d]efendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court.” (*Id.* at p. 1391.) A court that does not know “the scope of its discretionary powers” cannot exercise its “informed discretion.” (*Ibid.*) Thus, “the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ ” (*Ibid.*)

Next, relying on language from *Romero, supra*, 13 Cal.4th at pp. 531-532, Hughes argues the “ ‘record does not contain all of the material a reviewing court should consider in deciding whether a trial court properly exercised its discretion’ ” because the trial court had not yet had the chance to weigh the relevant factors.

We are unpersuaded. The trial court made its statement against striking the enhancement in the context of fully explaining its decisions during the sentencing hearing, stating, “30 years is an appropriate sentence in this particular case for a variety of reasons.”

The trial court spent considerable time weighing the factors in this case. The court considered mitigating factors such as Hughes’s age, the length of time between his most recent conviction and the current offense, and his abandonment of the robbery without causing injury with the firearm. The court then weighed those against the aggravating factors, such as Hughes’s testimony at trial, which the court characterized as false, the court’s decision to strike all but one of Hughes’s strikes, and the court’s decision to run the second attempted robbery count concurrently with the first count. The court was also aware of Hughes’s probation report, which stated no mitigating factors.

The record is complete and we conclude the trial court considered the material it should have if it had authority to exercise its discretion.

Finally, Hughes argues appellate courts may not substitute their judgment for that of the trial courts. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 961.) While correct, this is not persuasive. The trial court has stated on the record that it would not strike the firearm enhancement.

#### **IV. The abstract of judgment shall be corrected.**

As a final matter, the People request that the abstract of judgment be corrected to show the concurrent section 12022.53, subdivision (b) enhancement for the second attempted second-degree robbery count. The trial court “impos[ed] the exact same sentence [as count one] but concurrently with respect to Count Two.” Count one

contains a 12022.53, subdivision (b) enhancement, thus count two should as well. The abstract of judgment shall be corrected to show the missing enhancement.

### **DISPOSITION**

We reverse only the sentence enhancements imposed pursuant to section 667, subdivision (a), and remand the matter to the trial court with directions to exercise its discretion whether to strike one or more of these prior felony enhancements. We express no opinion on how the court should exercise its discretion on remand. In addition, the abstract of judgment shall be corrected to show the missing concurrent section 12022.53, subdivision (b) enhancement for the attempted second-degree robbery in count two. In all other respects, the judgment is affirmed.

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Siggins, P.J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.

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